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5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 United States of America,  
10 Plaintiff,

No. CR-11-02275-PHX-GMS

**ORDER**

11 v.

12 Noe Abrego,

13 Defendant.

14 Plaintiff United States has filed a Motion for an Order permitting involuntary  
15 medication of Defendant Noe Abrego to restore him to competency to stand trial. (Doc.  
16 71.) The Motion is granted for the reasons described below.

17 **BACKGROUND**

18 Abrego was allegedly intercepted near San Luis, Arizona, at the U.S.-Mexico  
19 border on September 26, 2011, after having been deported on September 7, 2011. The  
20 grand jury charged Abrego with violations of 8 U.S.C. § 1326(a) and (b)(1). (Doc. 20.)  
21 On May 31, 2012, this Court found Abrego incompetent to stand trial and ordered that he  
22 be committed to the custody of the Attorney General for hospitalization and psychiatric  
23 treatment pursuant to 18 U.S.C. § 4241(d). (Doc. 51.) He was transferred to the Federal  
24 Medical Center in Butner, North Carolina ("FMC-Butner") in July of 2012.

25 The FMC-Butner staff diagnosed Abrego with schizoaffective disorder of a  
26 bipolar type, antisocial personality disorder, and gastroesophageal reflux disease. (Hr'g  
27 Ex. 4 at 9.) They also determined that Abrego was incompetent to stand trial. (*Id.* at 11.)  
28 The FMC-Butner staff encouraged Abrego to take psychotropic medication, but he

1 repeatedly refused to do so, largely because he did not think he was incompetent. In a  
 2 written report (the “FMC-Butner Evaluation”), the treating doctors requested a judicial  
 3 order authorizing them to forcibly medicate Abrego for the sole purpose of restoring him  
 4 to competency for trial. The evaluators recognized that their request was subject to the  
 5 requirements set forth in *Sell v. United States*, 539 U.S. 166 (2003). The FMC-Butner  
 6 Evaluation set forth the doctors’ reasons for concluding that the *Sell* requirements were  
 7 satisfied. The government subsequently filed this Motion on December 28, 2012. (Doc.  
 8 71.)

9 The Court held a *Sell* hearing on January 30, 2013. The two co-authors of the  
 10 FMC-Butner Evaluation—Drs. Angela Walden Weaver and Robert Lucking—testified  
 11 for the government. The defense presented no evidence.

## 12 DISCUSSION

### 13 I. LEGAL STANDARD

14 In “rare” instances, “the Constitution permits the Government involuntarily to  
 15 administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges  
 16 in order to render that defendant competent to stand trial.” *Sell*, 539 U.S. at 179. Four  
 17 factors inform that determination, and the government must present clear and convincing  
 18 evidence to satisfy each factor. *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 692 (9th Cir.  
 19 2010). First, “a court must find that important governmental interests are at stake.” *Sell*,  
 20 539 U.S. at 180. Second, “the court must conclude that involuntary medication will  
 21 significantly further those concomitant state interests.” *Id.* at 181. Third, “the court must  
 22 conclude that involuntary medication is necessary to further those interests.” *Id.* And  
 23 fourth, “the court must conclude that administration of the drugs is medically  
 24 appropriate.” *Id.*

### 25 II. ANALYSIS

26 The Supreme Court has reaffirmed on several occasions a “liberty interest in  
 27 freedom from unwanted anti-psychotic drugs.” *Riggins v. Nevada*, 504 U.S. 127, 137  
 28 (1992); *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Sell*, 539 U.S. at

1 178. An order requiring involuntary medication of a prisoner is therefore “disfavored”,  
2 *Rivera-Buerrero*, 429 F.3d at 1137, and requires “thorough consideration and  
3 justification” and “especially careful scrutiny”, *United States v. Williams*, 356 F.3d 1045,  
4 1055 (9th Cir. 2004). “The Supreme Court clearly intends courts to explore other  
5 procedures, such as *Harper* hearings (which are to be employed in the case of  
6 dangerousness) before considering involuntary medication orders under *Sell*.” *Rivera-*  
7 *Guerrero*, 426 F.3d at 1137. Only in “highly-specific factual and medical circumstances”  
8 should a district court issue a *Sell* order. *Id.* at 1136. The government, however, has  
9 expressly disclaimed reliance on *Harper*. The government has asserted that, at least so  
10 far, Abrego has not exhibited the requisite showing of dangerousness to proceed under  
11 *Harper*.

12 **A. Important Government Interest**

13 Abrego is charged with illegal reentry in violation of 8 U.S.C. § 1326. (Doc. 20.)  
14 The run-of-the-mill illegal reentry case does not fit the paradigm of a “serious” crime.  
15 *See Sell*, 539 U.S. at 180 (“The Government's interest in bringing to trial an individual  
16 accused of a *serious* crime is important.” (emphasis added)). Nevertheless, “at least under  
17 some circumstances, a violation of § 1326 may constitute a ‘serious’ crime sufficient to  
18 justify involuntary medication under *Sell*.” *United States v. Hernandez-Vasquez*, 513 F.3d  
19 908, 919 (9th Cir. 2008); *see also River-Guerrero*, 426 F.3d at 706 n.5. A rough  
20 approximation of the crime’s “seriousness” is the sentencing guideline range applicable  
21 to the defendant. *Hernandez-Vasquez*, 513 F.3d at 919 (“Although the sentencing  
22 guidelines no longer are mandatory, they are the best available predictor of the length of a  
23 defendant's incarceration.”).

24 Applying the *Hernandez-Vasquez* framework, the guideline range applicable to  
25 Abrego based on the pretrial services report is 92-115 months. (Docs. 4, 71.) This  
26 relatively lengthy sentence would stem from Abrego’s extensive criminal history, which  
27 includes convictions for possession and purchase of controlled substances, possession of  
28 controlled substances while armed, and felony possession of a firearm. (Doc. 4.) These

1 are serious violations, and the presence of weapons in at least two of them amplifies that  
2 seriousness. Keeping in mind that Abrego has been in the government's charge for  
3 approximately 16 months, Abrego remains subject to an additional 76-99 months in  
4 custody. That history and guideline range is similar to the adjusted 53-78 month range in  
5 *Ruiz-Gaxiola*, which was sufficient to support an important government interest. 623 F.3d  
6 at 694-95. Moreover, Abrego tried to reenter the U.S. a mere three weeks after his  
7 removal. The proximity of offenses is also a factor relevant to the determination of  
8 whether the government has an important interest in bringing the defendant to trial. *Id.* at  
9 694.

10 Whether the defendant faces a risk of civil confinement if released is also a factor  
11 in determining the importance of the government interest. *Id.* at 693-94. This is because  
12 civil confinement "would 'diminish the risks that ordinarily attach to freeing without  
13 punishment one who has committed a serious crime,' and thereby lessen the need for  
14 prosecution." *Id.* at 693 (quoting *Sell*, 539 U.S. at 180). There is no indication in the  
15 record before the Court that Abrego would face civil confinement if released; indeed, he  
16 would likely be deported.

17 The Court notes that these are atypical facts for a § 1326 proceeding. The typical  
18 illegal reentry case would be an unlikely candidate for an "important interest."  
19 Nevertheless, the unique confluence of factors in this case leads the Court to conclude  
20 that the government has established an important interest by clear and convincing  
21 evidence in bringing Abrego to trial.

#### 22 **B. Further the State Interests**

23 Involuntary medication must further two important state interests. The  
24 administration of the drugs must be "substantially likely to render the defendant  
25 competent to stand trial", while at the same time making it "substantially unlikely [for the  
26 defendant] to have side effects that will interfere significantly with the defendant's ability  
27 to assist counsel in conducting a trial defense." *Sell*, 539 U.S. at 181. The Ninth Circuit  
28 has required district courts "to make factual findings so that the defendant may be assured

1 that the trial court has conducted the stringent review mandated in light of the substantial  
2 infringement on his liberty interests, and so that upon review the appellate court may  
3 determine whether the findings are supported by clear and convincing evidence.” *Ruiz-*  
4 *Gaxiola*, 623 F.3d at 696.

5 The Court has reviewed the evidence produced by the government doctors.<sup>1</sup> Their  
6 joint opinion is that antipsychotic medication is substantially likely to render Abrego  
7 competent to stand trial. (Hr’g Ex. 4 at 18.) They seek to administer a medication known  
8 as Risperidone, a “second generation antipsychotic.” (*Id.* at 23.) Central to the doctors’  
9 conclusion was the fact that Abrego was previously found incompetent to stand trial but  
10 was restored to competency through involuntary medication with antipsychotics for a  
11 period of several months in late 2010 through early 2011. (*Id.* at 19; Doc. 4 at 3.) There is  
12 thus direct evidence of the effectiveness of antipsychotics in treating Abrego’s mental  
13 illnesses. This stands in contrast to Ninth Circuit’s decision to reverse in *Ruiz-Gaxiola*,  
14 where the lower court lacked evidence that the defendant had responded favorably to  
15 antipsychotics. 623 F.3d at 699.

16 As defense counsel pointed out at the hearing, however, the previous involuntary  
17 medication of Abrego involved a different antipsychotic. He was treated with a variety of  
18 “first generation” antipsychotics, including Zyprexa and Haldol. (Hr’g Ex. 4 at 3-4.)  
19 Abrego thus contends that his previous treatment does not inform whether the current  
20 suggested treatment would be effective in restoring him to competency. The difference in  
21 medication, however, does not disturb the fact that involuntary medication with  
22 antipsychotics has been effective with Abrego. The main difference between the first and  
23 second generation of drugs appears to be in their side effects, and Dr. Lucking testified  
24 that the side effects with the second generation medications (which he seeks to use) are  
25 less onerous. (Hr’g Ex. 4 at 22.) Both generations of medication are “equally effective in  
26 treating the positive symptoms of schizophrenia. . . .” (*Id.* at 18.) The Court therefore

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28 <sup>1</sup> Abrego did not present any testimony.

1 finds that Abrego's medical history is persuasive on the question of the likely  
2 effectiveness of the medication in restoring Abrego to competency.

3 That conclusion is bolstered by the medical evidence submitted by the government  
4 through the FMC-Butner Evaluation filed by Drs. Walden Weaver and Lucking. They  
5 point to numerous studies that show that individuals with active psychotic illness can be  
6 restored to competency through involuntary medication with antipsychotics. (*Id.* at 20-  
7 22.) Moreover, Risperidone's stated effect is to reduce the very symptoms that currently  
8 render Abrego incompetent to stand trial. (*Id.* at 18-19.) Dr. Walden Weaver testified that  
9 she or a member of her staff had been in contact with Abrego on a regular basis, and thus  
10 her opinion on the likely effectiveness of medication receives great weight. Thus the  
11 Court concludes that involuntary medication is substantially likely to restore Abrego to  
12 competence.

13 With regard to side effects, the evidence is that they are unlikely to affect Abrego  
14 at trial. Like all antipsychotics, the second-generation medications do have some side  
15 effects. Those side effects, however, would most likely be metabolic, not neurological.  
16 (*Id.* at 16-17.) Metabolic side effects are unlikely to render Abrego unable to stand trial.  
17 Furthermore, Abrego does not have any underlying brain disease or other condition that  
18 would be exacerbated by administration of the medication. (*Id.* at 21.) Nor is sedation a  
19 probable side effect. (*Id.*) The Court therefore concludes that it is substantially unlikely  
20 that Abrego will experience side effects that will interfere significantly with his ability to  
21 assist counsel in conducting a trial defense.

### 22 C. Necessity

23 For involuntary medication to be in order, "any alternative, less intrusive  
24 treatments [must be] unlikely to achieve substantially the same results." *Sell*, 539 U.S. at  
25 181. That is the case here. Abrego does not believe that he has a mental illness and  
26 therefore does not believe that he needs treatment. (Hr'g Ex. 4 at 21.) In fact, he has  
27 continually refused any treatment for his mental illness. These are facts that tend to  
28 establish this third prong of the *Sell* inquiry. *See Ruiz-Gaxiola*, 623 F.3d at 703 (noting

1 defendant's "resistance to treatment and his conspiratorial delusions[ ] made it unlikely  
2 that he would engage in . . . voluntary therapy"). Abrego is also unable to engage with  
3 others and therefore psychotherapy would likely be ineffective. (Hr'g Ex. 4 at 21.) Even  
4 if he could, the doctors assert that "[t]here is no evidence that psychotherapeutic  
5 techniques alone are effective alternatives for antipsychotic agents." (*Id.*) The doctors  
6 predict that it will require at least 120 days to restore Abrego to competency, the  
7 allowable time under 18 U.S.C. § 4241(d). The Court therefore concludes that any  
8 alternative, less intrusive treatments would be unlikely to achieve substantially the same  
9 results with Abrego.

#### 10 **D. Medical Appropriateness**

11 The government must finally show that "administration of the drugs is medically  
12 appropriate, i.e., in the patient's best medical interest in light of his medical condition."  
13 *Sell*, 539 U.S. at 181. "[T]he scope of the inquiry with respect to the fourth *Sell* factor is  
14 far broader than with respect to the second *Sell* factor. . . . [T]he fourth *Sell* factor  
15 requires the court to consider all of the medical consequences of the proposed involuntary  
16 medication, including those consequences that may not affect the defendant's trial in any  
17 way, but result in long term side effects." *Ruiz-Gaxiola*, 623 F.3d at 704. For example, "it  
18 is not medically appropriate to reduce [the defendant's] delusions by involuntary  
19 medication for the period of the criminal trial if the delusions will resume upon its  
20 completion and, due to the medication, cause him to experience long-term side effects."  
21 *Id.* at 705.

22 Abrego suffers from a range of mental illnesses. Treatment of those illnesses is in  
23 his best medical interest. Up until this point, Abrego has refused treatment, which has  
24 resulted in a lack of improvement in his mental condition. He continues to exhibit  
25 delusion and a general lack of knowledge regarding his circumstances. (Hr'g Ex. 4 at 6-  
26 10.) He cannot carry on conversations with medical staff. (*Id.*) For example, he believes  
27 that everyone is involved in a plan to deny him Social Security benefits and that people  
28 were sneaking into his room to manipulate his genitals and alter his tattoos. (*Id.* at 6.)



1 Treatment would mitigate these symptoms. Indeed, he was treated favorably with first  
2 generation antipsychotics previously, and there is no evidence that he suffered adverse  
3 side effects beyond those exhibited and controlled during treatment. The treatment with  
4 the second generation antipsychotics presents a much better scenario. Use of the  
5 Risperidone instead of the first generation medication significantly reduces the incidence  
6 of neurological side effects, although neurological side effects occur in rare instances.  
7 (Hr'g Ex. 4 at 16-17.) The more likely side effects that for Abrego are metabolic, such as  
8 weight gain. (*Id.* at 17.) There is also a chance, albeit a small one, of the development of  
9 diabetes. (*Id.* at 17-18.) However, all of these potential side effects can be managed with  
10 relative ease through both non-medication treatment and medication. (*Id.*)

11 Abrego contends that there is a potential that he will have long-term side effects  
12 after discharge from the institution. He does not cite any medical evidence for that  
13 proposition, however. Furthermore, Abrego had been previously medicated with  
14 antipsychotics and does not appear to have suffered lasting side effects after restoration to  
15 competency. Finally, Abrego will remain in federal custody after his time at FMC-Butner  
16 expires, and will be observed there for any residual side effects post-medication.

17 There is no evidence that Abrego will experience long-term side effects that offset  
18 the benefit he would receive from treatment of his mental condition. Both doctors  
19 testified that the medication was medically appropriate. They have prescribed a clear,  
20 careful regime of medication that includes monitoring for potential side effects, how they  
21 will combat those side effects should they arise, and the length of time they anticipate the  
22 treatment taking. (*Id.* at 22.) Their report reveals that they are proceeding with caution  
23 and sensitivity in this grave matter. *See United States v. Evans*, 427 F. Supp. 2d 696, 704-  
24 05 (W.D. Va. 2006). In light of all this, the government has established by clear and  
25 convincing evidence that involuntary medication is medically appropriate.

## 26 CONCLUSION

27 The government has produced clear and convincing evidence to satisfy all four of  
28 the *Sell* factors, and that evidence stands un rebutted by Abrego. The Court therefore



1 orders that involuntary medication of Abrego begin and follow the manner prescribed by  
 2 Drs. Walden Weaver and Lucking in the FMC-Butner Evaluation at page 22. That report  
 3 is reproduced here:

4 Mr. Abrego will be treated with risperidone Consta within the dosage range  
 5 of 25 to 50 mg intramuscularly every two weeks due to the report of side  
 6 effects related to haloperidol. Extrapyramidal side effects, should they  
 7 arise, will be treated with . . . . benztropine in the dosage range from 0.5 mg  
 8 to 2.0 mg twice daily. Akathisia, if it develops[,] would be treated with a  
 9 combination of benztropine (dosage above) and propranolol 20 mg to 60  
 mg daily or mirtazapine 15 mg to 60 mg. . . . Metabolic side effects, should  
 they arise[,] will be treated by . . . medical management of the specific  
 metabolic side effect. . . .

10 (Hr'g Ex. 4 at 22.) If any alterations to that plan are necessary, the government shall  
 11 present a new treatment plan to the Court. If Abrego elects to take the medication  
 12 voluntarily upon confrontation with this Order, the government may proceed with the  
 13 treatments described in the FMC-Butner Evaluation that Abrego had previously rejected.

14 **IT IS THEREFORE ORDERED** that:

- 15 1. The government's Motion (Doc. 71) is **GRANTED**.
- 16 2. The government shall proceed with the involuntary medication of Abrego  
 17 in the manner described above.
- 18 3. All medical personnel treating Abrego shall request that Abrego voluntarily  
 19 take medication orally before each and every administration of medication by injection.
- 20 4. The government shall give a status report every 30 days until 120 days have  
 21 expired from the date of this order, pursuant to 18 U.S.C. § 4241(d)(2).

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